POST & SCHELL PC
ATTORNEYS AT LAW

Four Penn Center, 13th Floor
1600 John F. Kennedy Blvd.
Philadelphia, PA 19103-2808
215-587-1000 Main
215-587-1444 Main Fax
www.postschell.com

John N. Joseph
215-587-1191 Direct
215-320-4190 Direct Fax

January 30, 2017

VIA FACSIMILE & REGULAR MAIL

The Honorable Joel H. Slomsky
United States District Judge
United States District Court for the
Eastern District of Pennsylvania
James A. Byrne U.S. Courthouse
601 Market Street, Room 13614
Philadelphia, PA 19106

FILED
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KATE BARKMAN, Clerk
By ________ Dep. Clerk

Re: *United States v. Yu Xue, et al.* (Case No. 2:16-CR-00022 (JHS))

Dear Judge Slomsky:

We represent the four Defendants in the above-captioned case: Yu Xue, Tao Li, Tian Xue and Lucy Xi, collectively "the Defendants."[1] We write to update the Court regarding the status of pretrial proceedings and to request that the Court set a pretrial status conference to address several outstanding discovery issues.

I. PROCEDURAL HISTORY

On January 20, 2016, the Defendants were indicted in the Eastern District of Pennsylvania. The Indictment alleges that, between 2012 and 2016, the Defendants engaged in a conspiracy to steal trade secrets and confidential information from GlaxoSmithKline (GSK). The Indictment charges 43 criminal counts, including wire fraud; conspiracy to commit wire fraud; theft of trade secrets; conspiracy to steal trade secrets; and conspiracy to commit money laundering. At their arraignment on February 11, 2016, each Defendant entered a plea of not guilty and trial was set for March 23, 2016.

On the arraignment date, the government filed a Motion for Complex Case Designation under the Speedy Trial Act. ECF 42. The government emphasized the "significant amount of data" that it would be providing in discovery, including a "first batch" consisting of "1 terabyte of data" and thousands of e-mails. *Id.* at 1. The government also anticipated that it would

[1] Counsel's collective representation of "the Defendants" does not include co-defendant Yan Mei as he is currently a fugitive not represented by counsel.

produce "additional batches" of data as its investigation continued. *Id.* at 2. The government requested a continuance of trial under 18 U.S.C. § 3161(h)(7)(B)(II), which requires the Court to consider "[w]hether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact of law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established" by the Speedy Trial Act. On February 15, 2016, the Defendants filed a motion joining the Government's requests that the case be designated complex and that the trial date be continued. ECF 48. On February 17, 2016, the Court designated the case "complex" and vacated the trial date. ECF 52.

Between February and September of 2016, the parties extensively litigated the parameters of a Protective Order that would govern the release and review of discovery materials. In particular, on February 19, 2016, the government filed an initial Motion for a Protective Order with a proposed Protective Order attached. ECF 53. On February 26, 2016, the Defendants filed an Opposition that acknowledged the need for a tailored protective order but objected to the scope and conditions of the government's proposed Order, and proposed an alternative Protective Order. ECF 60. On March 7, 2016, the government filed a Reply, again asking the Court to adopt its Proposed Order. ECF 61. On March 22, 2016, the Court issued a Temporary Protective Order to allow for limited discovery until a Final Protective was issued. ECF 70.

On April 22, 2016, the Court held a hearing on the Motion for a Protective Order. At the hearing, the government presented testimony from two witnesses: (1) Colleen McMahon, a GSK security executive and (2) David Loveall, a digital forensic consultant for the FBI. The Defense presented the testimony of Leo Dyson, the operations and projects director of HighQ. The Court heard oral argument on the Protective Order issue on May 16, 2016.

On July 15, 2016, the Court conducted a telephonic status conference to discuss the parameters of a Final Protective Order. During the call, the Court directed the government to file a proposed Final Protective Order that conformed to the procedures approved by the Court. On August 16, 2016, the government filed a Motion for a Final Protective Order. ECF 104. On August 24, 2016, the Defendants filed an Opposition that objected to four provisions in the government's proposal. ECF 105. On September 15, 2016, the Court conducted a telephone conference with the parties. On September 20, 2016, the government filed a Revised Motion for a Final Protective Order. ECF 108. The Court granted the Motion on September 27, 2016, and entered the Final Protective Order.

There are presently no court dates set in this case.

II. The Current Status of Pre-Trial Proceedings

A. The Defense's Inability to Effectively Review Discovery

On December 7, 2016, the government produced an encrypted hard drive with over six terabytes of data. To comprehend the scale of this amount of information, it is estimated that six terabytes of data equates to approximately half of all the information housed in the Library of Congress. That same day, the government informed the Defense that the software "FTK Viewer" was loaded onto the hard drive to enable the Defense to review the millions of documents. However, the government also noted that "[w]ith this software, you can only view the documents. It is not very user friendly. There is no search capability. You will be literally looking for a needle in a haystack..." The Defense has diligently attempted to review and analyze the voluminous electronic discovery, but has continuously encountered severe difficulties that hinder its ability to adequately represent the Defendants.

Despite following the government's instructions on how to view the documents with FTK Viewer, the Defense was unable to access any materials within the folder labeled "Electronic Discovery" – which contained all materials recovered from laptops, phones, tablets and thumb drives seized from the Defendants the day they were arrested.

On January 5, 2017, counsel for Dr. Li met with the government to walk through the steps required to access the Electronic Discovery folder. At that meeting, the government informed counsel that the Electronic Discovery documents could not actually be viewed on FTK Viewer. To view those documents, the Defense would have to separately open each folder in which the documents are located, separately download each document, save each document to a designated location on the computer, and separately open each downloaded document in an appropriate program such as Word or PowerPoint. These steps must be repeated for each separate document contained within the Electronic Discovery folder. It took the Defense approximately two minutes to complete all the steps required to view a single document. There are at least tens of thousands of documents within the Electronic Discovery folder. Without any viable search capability, the Defense is forced to randomly go through this cumbersome procedure without even knowing whether the document being opened is likely to be relevant.

At this same meeting, the government also revealed that there are an unspecified number of documents on the hard drive that require specialized scientific software to view. As it stands now, the Defense cannot access these documents at all.

As the government acknowledged in an email dated December 7, 2016, the reason the Defense has been unable to search across the universe of documents is because the government did not load the full version of FTK Viewer onto the hard drives. Assuming that six terabytes of data is over 500 million pages, the ability to search for key terms is essential to identifying relevant materials within the colossal volume of documents that have been produced. The government's position is that the Defense must purchase an additional license – for approximately $5,000 per user – if it wishes to have the ability to perform searches, as well as view and organize the documents within the software.[2]

[2] The Defense is unable to use any other e-discovery vendors, because those vendors require access to the Internet to host the documents for viewing, searching and organizing, which is prohibited by the Final Protective Order. Even if using a traditional e-discovery vendor was an option for processing the documents, it would be cost prohibitive. The typical monthly fee for

The impediments to reviewing discovery that are presented by the Defense's inability to search and access all documents are compounded by the Defense's severely limited ability to print the documents that it does manage to access and view. Pursuant to the Final Protective Order, the hard drives are kept in a locked room and cannot be plugged into a computer that is connected to the Internet. As a result, materials on the hard drive cannot be sent to industrial high-speed printers capable of printing large batches of documents at 95 pages-per-minute. Instead, the Defense must manually open and print each document on a low-speed printer directly connected to the computer inside the locked room. Such printers are suitable only for small-scale print jobs. As one example of the enormous time required to print a small sample of documents, it took a file clerk the better part of a day just to print the FBI 302 reports and their attachments.

The Defense's inability to efficiently print relevant documents for assembly into review binders creates an additional hardship, because each defense team is limited to one computer terminal. The result is that, without the ability to print hard copies, no more than one attorney for each Defendant can review the electronic discovery material at any given time. Moreover, electronic-only review is largely ineffective, because the Defense has no ability to organize viewed documents into electronic folders or to take notes within the documents under the provided version of FTK Viewer. Even if multiple hard copies of documents could be made for multiple attorneys to review, the prohibition on taking the discovery outside of the locked rooms presents additional obstacles to trial preparation, such as severely restricting the Defense's ability to work with the materials outside of regular office hours.

We also note that the government's December 7, 2016 email represented that the Defense would receive laptops loaded with the discovery for their review by January 2017. On January 9, 2017, the government informed the Defense that the laptops would be ready "soon." To date, the Defense still has not received the promised laptops. Without the laptops available, Dr. Li was required to fly from San Diego to Philadelphia on January 15, 2017, to begin reviewing the discovery.

In sum, the limitations placed on the Defense under the Protective Order, combined with the fact that the government has provided voluminous discovery on encrypted hard drives that only allow for essentially random "hunt and peck" document review, have created an untenable framework for discovery in this complex criminal case that is severely hampering the Defendants' ability to prepare an effective defense.

B. The Defense's June 2016 Presentation to the Government on the Trade Secrets Alleged in the Indictment

Shortly after the Temporary Protective Order was signed on March 22, 2016, the

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e-discovery arrangements is based on the volume of data – for six terabytes of data, the hosting fees alone would be tens of thousands of dollars per month.

government produced to the Defense the documents that are identified in the Indictment as allegedly containing trade secrets. In the following month or so, a bio-chemical Ph.D. scientist employed by Arent Fox, Dr. Robert Edwards, conducted a painstaking, line-by-line analysis of the documents. Dr. Edwards' analysis revealed that virtually all of the information contained in the documents was *publicly available* – either in published patents or in published documents that were largely available on the Internet without any restrictions.

Dr. Edwards detailed his findings in a 32-page memorandum that identifies the public-source material where each alleged trade-secret could be found.[3] At a meeting on June 21, 2016, the Defense provided this memorandum to the government and presented a PowerPoint presentation explaining Dr. Edwards's findings. At the conclusion of the meeting, the government indicated that it would likely respond to the submission within several weeks. The date for the government's response has been repeatedly delayed for months despite the Defense's numerous requests for a formal response. As of the date of this letter, the government has not responded to the Defense's presentation, and it has indicated that it will be unable to provide a response until March 2017, at the earliest. It is the Defense's belief that the government has only recently hired an independent expert to review whether the information that the Indictment alleges to be trade secrets is, in fact, publicly available.

III. SUPPLEMENTAL RULE 16 AND *BRADY* REQUESTS

We respectfully submit that the foregoing demonstrates that the government has not provided the Defense with adequate access to discovery materials that the Defendants need to defend the case and prepare for trial. Moreover, the government's failure to provide the Defense with its position on the alleged trade secrets described in the Indictment, seven months after receiving a detailed demonstration that the alleged trade secrets are instead publicly-available information, establishes – at the least – that there is substantial additional Rule 16 and *Brady* material that the government must turn over to the defense.

Accordingly, pursuant to Rule 16 of the Federal Rules of Criminal Procedure, the Defendants ask that the government be required to state in writing: (1) what precise language, if any, contained in each document described in the Indictment does the government contend constitutes trade secret information; (2) what precise language, if any, contained in each document described in the Indictment does the government contend constitutes confidential information; and (3) what documents, or portions of documents, described in the Indictment does the Government acknowledge to be publicly available. Given that the government has reportedly had experts from GSK, as well as one or more independent experts, reviewing the Defendants' presentation for several months, the government should be able to provide this information promptly.

The Defendants also ask that the government be required to produce all *Brady* information that has been derived from reviews and/or analyses of the Defendants' trade-secret

[3] The Defendants will provide a copy of this memorandum to the Court upon request.

presentation by GSK and/or the government's independent experts. More specifically, the Defendants hereby request, pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny, including *United States v. Agurs*, 427 U.S. 97 (1976), *Giglio v. United States*, 405 U.S. 150 (1972), and *Kyles v. Whitley*, 514 U.S. 419 (1995), that the government produce to the Defendants any documents created in the course of the government's and GSK's investigation, review, and/or analysis of the Defense's June 2016 presentation, including the following:

(1) All documents[4] describing, discussing, reflecting, or relating to the views of any GSK employee concerning whether any of the information referenced in the Indictment contains, or does not contain, confidential material or trade secrets.

(2) All documents describing, discussing, reflecting, or relating to the views of any GSK employee concerning the Defense's June 2016 position paper and presentation.

(3) All documents describing, discussing, reflecting, or relating to the views of any independent expert(s) concerning whether any of the information referenced in the Indictment contains, or does not contain, confidential material or trade secrets.

(4) All documents describing, discussing, reflecting, or relating to the views of any independent expert(s) concerning the Defense's June 2016 position paper and presentation.

Finally, as explained previously, the government has provided many millions of pages of discovery to the Defendants in a format that makes it impossible for the Defense to search for terms within the documents in order to review them meaningfully and prepare for trial. Certain of the Defendants also believe, based on their memories of their work at GSK, that the millions of pages of documents that have been produced likely will include many documents that contain *actual* trade secret and confidential material – far more than are included in the allegations of the Indictment. This information alone would constitute *Brady* material, because it would tend to establish that the Defendants allegedly emailed/transferred only a small subset of documents that the government erroneously claims contained trade secrets or confidential material, and that documents that the Defendants did not allegedly email/transfer contained sensitive information that, if released, would have harmed GSK. This evidence is favorable to the Defense, because it would undermine the Indictment's allegations that the Defendants had the requisite intent to violate the law. The manner and format in which discovery has been produced make it impossible for the Defendants to review the millions of pages of documents and identify those that include trade secrets or confidential material. The government has had over a year to review the documents, and it still has not identified those that allegedly contain trade secrets. GSK has previously stated that it would only take "several weeks" for a team of their employees to identify the trade secret or confidential documents from within the tranche of materials seized from the Defendants' personal email accounts and Defendants Yu Xue's and Lucy Xi's GSK laptops. *See* April 22, 2016 Hearing Transcript, pp. 56-57. The only way for this important *Brady* information to be properly identified and provided to the Defendants is for the Government to undertake the review and produce the results to the Defense.

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[4] The term "documents" as used herein includes, but is not limited to, all books, papers, letters, correspondence, reports, memoranda, calendars, appointment books, diaries and notes, messages and computer facilitated or transmitted materials, images, photographs, audio and video tapes, recordings, transcripts, ledgers, printouts, contracts, checks, pleadings, invoices, statements, receipts, and all copies or portions thereof.

IV. CONCLUSION

The Indictment against the Defendants was returned more than one year ago. Although voluminous discovery has been produced, and more is expected in the future, the logistical difficulties described herein have prevented the Defendants from meaningfully reviewing any of it. We respectfully ask the Court to convene a status conference to address these and the other issues discussed in this letter so that pretrial proceedings in this case can advance in the interests of justice.

Sincerely,

/s/ John N. Joseph

John N. Joseph, Esq.
Yune D. Emeritz, Esq.
POST & SHELL, P.C.
Four Penn Center
1600 John F. Kennedy Blvd.
Philadelphia, PA 19103
Attorneys for Defendant Tao Li

/s/ Peter R. Zeidenberg

Peter R. Zeidenberg, Esq.
ARENT FOX LLP
1717 K Street, NW
Washington, DC 20006
Attorney for Defendant Yue Xue

/s/ Eric L. Yaffe

Eric L. Yaffe, Esq.
Frank J. Sciremammano, Esq.
GRAY, PLANT, MOOTY, MOOTY & BENNETT, P.A.
The Watergate – Suite 700
600 New Hampshire Avenue, NW

Washington, DC 20037
Attorneys for Defendant Lucy Xi

/s/ David Schertler

David Schertler, Esq.
SCHERTLER & ONORATO LLP
1101 Pennsylvania Avenue, N.W.
Suite 1150
Washington, DC 20004
Attorney for Defendant Tian Xue

cc: Robert James Livermore, Assistant United States Attorney
Edward J. McAndrew, Counsel for GlaxoSmithKline, LLC